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June 26, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 9, 2004

Case No.: TIA-0057

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of his late father, XXXXXXXXXXXX (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The Physician Panel Rule specifies the standard for Physician Panel determinations. The Rule provides:

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to, or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. As the foregoing indicates, the Panel must determine whether "it is as least as likely as not" that a worker's exposure was a "significant factor in aggravating, contributing to, or causing" the illness or death at issue.

1/ See www.dol.gov/esa.

2/ See www.eh.doe.gov/advocacy.

B. Factual Background

The Worker was employed as a janitor by a DOE contractor at the DOE's Los Alamos National Laboratory. The Worker began his employment at the site in 1969 at the age of 54; his employment ended in 1981 at the age of 66, when he accepted a voluntary termination pursuant to a reduction-in-force. In 1992, at the age of 77, he was diagnosed with leukemia (polycythemia vera), and he died in 2001 at the age of 85. His death certificate listed renal failure as the immediate cause of death, pulmonary edema as a condition leading to his renal failure, and polycythemia vera as a significant condition contributing to his death.

In the application at issue in this case, the Applicant listed polycythemia vera and renal failure as the claimed illnesses. With respect to exposures, the Applicant stated that the Worker was employed in all areas at the site, including those with beryllium.

The Physician Panel found that the Worker had polycythemia vera, but the Panel did not render a positive determination. The Panel stated:

Polycythemia vera is a clonal disorder. It is the most common myeloproliferative disorder and occurs in about 2 per 100,000 people. It occurs in all age groups and has a genetic basis. A slight overall male predominance is observed. The etiology of Polycythemia vera is unknown.

Report at 1. Based on the foregoing, the Panel unanimously found that the illness was not related to toxic exposure at the DOE.

The Physician Panel found that the Worker had died of renal failure, but the Panel did not render a positive determination on that illness. The Panel discussed the Worker's medical history in detail and then stated:

No specific diagnosis is given to the renal failure, which may have been a consequence of dehydration and/or congestive heart failure. Also dosimetry records show very low Skin and Deep radiation exposure and zero neutron exposure over his working lifetime. There are lists of all chemicals to which the claimant had potential exposure. However, there is no record of a chronic exposure or accidental over exposure to any chemical(s) in particular. The family notes that he was

exposed to beryllium. Beryllium would be expected to cause a pulmonary disorder, not present as renal failure.

Report at 2. Based on the foregoing, the Panel unanimously found that the illness was not related to toxic exposure at DOE.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. Specifically, the Applicant challenges the Panel's determination on polycythemia vera. The Applicant provides a letter from the Worker's physician, stating that radiation exposure could have caused the Worker's polycythemia vera. He cites an article in the Journal of the American Medical Association in which "the authors suggest there may be a relationship between ionizing radiation and the development of polycythemia vera." July 17, 2002 Letter at 1-2. The physician concludes that "if [the Worker] were in a position where he could have been exposed to ionizing radiation, there is little question in my mind that this may have played a role in his diagnosis of polycythemia vera." *Id.* at 2.

II. Analysis

The physician's letter does not indicate Panel error. The Physician Panel determination stated that the etiology of polycythemia vera is unknown. The physician's letter does not conflict with that finding. The reference to an article in which "the authors suggest that there may be a relationship" between ionizing radiation and the development of polycythemia vera falls short of the regulatory standard. The suggestion that there may be a relationship does not mean that "it is as least as likely as not" that radiation exposure is "a significant factor in aggravating, contributing, or causing" polycythemia vera in general, let alone that radiation exposure was a significant factor in this case. Accordingly, the physician's letter does not provide a basis for finding Panel error.

Based on the foregoing, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0057 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 25, 2004